Petition

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81-1283
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,
v.
STATE OF IDAHO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Congress' decision to give states more time to consider the ratification of a proposed constitutional amendment is subject to federal judicial review despite the acknowledged unreviewability, as nonjusticiable political questions, of both (a) Congress' decision whether to treat particular ratifications as sufficiently timely and contemporaneous, and (b) Congress' decision whether to set any initial time limit at all.

2. Whether, if Congress' decision to extend time is judicially reviewable, the Constitution should be construed to freeze the 95th Congress into the time limit proposed by the 92d in the resolving clause but not in the text of the Equal Rights Amendment; and whether, if Congress did have the power to extend the time for this amendment's consideration, the Constitution required that it do so by a two-thirds vote.

3. Whether, given the necessity for some national body to determine the national rules for combining or tallying a sequence of official state ratifications and rescissions, the Federal Judiciary may undertake that task rather than entrusting it to Congress.

4. Whether, if Congress' treatment of purported rescissions is judicially reviewable, the Constitution should be construed to compel Congress to treat every state rescission of the proposed Equal Rights Amendment as automatically erasing the formal ratification that preceded it, even if those voting for rescission did so with official advice that such action would have no legal effect.

5. Whether these matters may be adjudicated by an Article III court in advance of the claimed ratification of the proposed Equal Rights Amendment by three-fourths of the states, at the behest of state legislators whose only "interest" in the lawsuit is that they voted

in favor of their state's resolution of ratification or of rescission.*

---

* The following parties were defendants-intervenors in the court below and are petitioners in this Court: National Organization for Women, Inc.; Idaho State NOW; Arizona State NOW; Washington State NOW; Flagstaff Chapter, NOW; Lake Havasu City Chapter, NOW; San Pedro Valley Chapter, NOW; Phoenix Chapter, NOW; Safford Chapter, NOW; Tri-City Chapter, NOW; Tucson Chapter, NOW; Wilcox Chapter, NOW; Boise Chapter, NOW; Cour d'Alene Chapter, NOW; Moscow Chapter, NOW; Blue Mountain Chapter, NOW; Clallam Chapter, NOW; Clark County Chapter, NOW; Cowlitz County Chapter, NOW; Enumclaw Chapter, NOW; Everett Chapter, NOW; Federal Way-Auburn Chapter, NOW; Grand Coulee Area Chapter, NOW; Grays Harbor Pacific Chapter, NOW; Mid Columbia Gorge Chapter, NOW; Okanogan Valley Chapter, NOW; Pullman Chapter, NOW; Renton Chapter, NOW; Seattle-King County Chapter, NOW; Skagit-Island Chapter, NOW; Spokane Chapter, NOW; Tacoma Chapter, NOW; Thurston County Chapter, NOW; Tri-Cities Chapter, NOW; and Yakima Chapter, NOW.

The defendant below was Rear Admiral Rowland G. Freeman, III, in his capacity as Administrator of the General Services Administration.

The following parties were plaintiffs or plaintiffs-intervenors in the court below: The State of Idaho; Pete T. Cenarrusa; Phillip E. Batt; Reed W. Budge; James E. Risch; J. Wilson Steen; Walter H. Yarbrough: W. Israel Merrill; Ralph Olmstead; Walter E. Little; Jack C. Kennevick; Larry E. Craig; Rusty W. Barlow; Noy E. Brackett; Kathleen W. Gurnsey; J. Michael Gwartney; Ernest A. Hale; Melvin F. Hammond; Gordon R. Hollifield; Ray E. Infanger; Gary J. Ingram; Gary L. Paxman; Tom W. Stivers; Wayne E. Tibbitts; The State of Arizona; S.H. "Hal" Runyan; Stan Turley; Frank Kelley; Burton S. Barr; Sam A. McConnell, Jr.; Trudy Camping; Jeffroy J. Hill; Anne Lindeman; Rod McMullin; James A. "Jim" Mack; John C. Pritzlaff, Jr.; Ray Rottas; Ed C. Sawyer; Wayne Stump; William L. Swink; Jack J. Taylor; Boyd Tenney; Bart Baker; Donna J. Carlson; Jim Cooper; Morris "Court" Courtright; Bob Denny; Pete Dunn; Jerry Everall; Thomas N. Goodwin; Juanita Harelson; Jim Hartdegen; John U. Hays; Cal Holman; Jane D. Hull; Bob Hungerford; D. Lee Jones; Lillian Jordan; Peter Kay; Don Kenney; David B. Kret; Carl J. Kunasek; Joe Lane; C.W. "Bill" Lewis; Diane B. McCarthy; Marjory "Marge" Ollson; James B. Ratliff; Betty Rockwell; E.C. Polly Rosenbaum; Jim Skelly; James J. Sossaman; Jacque Steiner; Doug Todd; Steve Vukcevich; Tony West; John Wettaw; Pat Wright; Claude L. Oliver; Kent Pullen; Richard M. Bond; and Sam C. Guess.

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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 81-

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,

v.

STATE OF IDAHO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review this case before judgment.

OPINIONS BELOW

The opinion of the United States District Court for the District of Idaho, dated December 23, 1981, from which this appeal is taken, is not yet officially reported. It appears as Appendix A, p. 1a, to the Jurisdictional Statement in No. 81-1287 ("App."), which is separately bound. The judgment of that court appears as Appendix B at 94a. Relevant prior orders and opinions on disqualification appear as Appendices C, p. 96a; D, p. 149a; L, p. 166a; M, p. 174a; and C, p. 177a. No judgment or opinion has been issued by the court of appeals.

JURISDICTION

Petitioners, the National Organization for Women, Inc., *et al.* (NOW),[1] were defendants-intervenors in a suit brought in federal district court pursuant to 28

[1] The National Organization for Women, Inc., was joined in the district court by three of its state organizations and thirty-one chapters in those states. All thirty-five parties are referred to throughout as "NOW."

U.S.C. §§ 1331, 2201, and 2202 and 1 U.S.C. § 106b (1976), against the Administrator of the General Services Administration (GSA). Plaintiffs were two states and several of their legislators. They sought declaratory and injunctive relief to strike down as unconstitutional the Joint Resolution of Congress extending the time to ratify the proposed Equal Rights Amendment, H.J. Res. 638, 92 Stat. 3799, 95th Cong., 2d Sess., 124 Cong. Rec. 26,265, 34,315 (1978), signed by the President on October 20, 1978, 14 Weekly Compilation of Presidential Documents 1800-1 (Oct. 20, 1978); they also sought a ruling that states may validly rescind their ratifications.

On December 23, 1981, the district court granted summary judgment for certain Idaho state legislators and awarded them the declaratory relief they sought.

On January 4, 1981, NOW filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from that judgment in the United States District Court for the District of Idaho, App. E, p. 150a, and the appeal has been docketed there as No. 82-3008. The jurisdiction of this Court rests on 28 U.S.C. §§ 1254(1) and 2101(e) (1976).

Under 28 U.S.C. § 1254(1), the Court is authorized to grant certiorari to review any case that is "in" the court of appeals. *See United States* v. *Nixon*, 418 U.S. 683, 690 (1974). Here, a notice of appeal to the court of appeals has been filed in the district court, and the certified docket entries have been filed in the court of appeals. F.R.A.P. 3. Since this case has been properly docketed in the court of appeals, it comes within Section 1254(1). *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 54-55 (5th ed. 1978).

Moreover, the instant case "is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." S. CT. R. 18. For the reasons set forth herein and in petitioner's motion for expedited consideration (filed concurrently herewith), certiorari before

judgment should be granted "because of the public importance of the issues presented and the need for their prompt resolution." *United States* v. *Nixon*, *supra*, 418 U.S. at 687. *See also* R. STERN & E. GRESSMAN, *supra*, at 55, 304.[2]

Accordingly, the Court should grant this petition for a writ of certiorari before judgment.[3]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article V of the Constitution provides as follows:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

1 U.S.C. § 106b provides as follows:

> "§ 106b. *Amendments to Constitution*
>
> Whenever official notice is received at the General Services Administration that any amendment pro-

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[2] Cases in which certiorari before judgment has been granted are collected in *United States* v. *Nixon*, *supra*, 418 U.S. at 686 n.1; S. CT. R. 18; and R. STERN & E. GRESSMAN, *supra*, at 55 n.4, 304 nn.68, 69.

[3] Petitioner is also filing a Jurisdictional Statement to review the judgment of the district court on direct appeal pursuant to 28 U.S.C. §§ 1252 and 2101(a). We believe that review of the district court's judgment is available in this Court both by appeal and by certiorari.

posed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Administrator of General Services shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

The Joint Resolution proposing the Equal Rights Amendment for ratification, H.J. Res. 208, 86 Stat. 1523 (1972), provides as follows:

> "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:
>
> 'ARTICLE—
>
> 'SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> 'SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> 'SEC. 3. This amendment shall take effect two years after the date of ratification."

The Joint Resolution extending the time for ratification of the proposed Equal Rights Amendment, H.J. Res. 638, 92 Stat. 3799 (1978), provides as follows:

> "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That notwithstanding any provision of House Joint Resolution 208 of the Ninety-second Congress, second session, to the contrary, the article of amendment proposed to the States in such joint

resolution shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States not later than June 30, 1982."

STATEMENT OF THE CASE

The relevant facts are not in dispute. On March 22, 1972, Congress approved and submitted to the states for ratification H.J. Res. 208, proposing the adoption of the Equal Rights Amendment to the United States Constitution, which would guarantee men and women "equality of rights under the law." Congress included a seven-year time limit for ratification in the proposing clause of the resolution but not in the amendment's text.

By 1978, the proposed amendment had been ratified by thirty-five states, only three fewer than the three-fourths required by Article V to amend the Constitution. Concerned that the additional ratifications might not be obtained by March 22, 1979, the original expiration date, proponents of the amendment urged Congress to extend the deadline. Congress conducted extensive hearings, considering at length both its authority to extend the ratification period and the desirability of doing so.[4] Congress concluded that it had the requisite authority, that the 1972 selection of seven years was not intended by the 92d Congress to be immutable, and that there was sufficient public interest in, and confusion about, the merits of the proposed amendment to warrant a further period for consideration. H.R. Rep. No. 95-1405, 95th Cong., 2d Sess. 11-12 (1978). Accordingly, by a vote of 233 to 189 in the House and by a vote of 60 to 36 in the Senate, Congress approved H.J. Res. 638, extending the period for ratification to June 30, 1982. The President signed

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[4] *Equal Rights Amendment Extension: Hearings on S.J. Res. 134 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. (1978); *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 95th Cong., 1st and 2d Sess. (1977 and 1978).

H.J. Res. 638 on October 20, 1978. Congress chose the June 30 date expressly "to coincide with State legislative sessions in the unratified States in 1982 [to] give those States an opportunity to consider the amendment in 1982." H.R. Rep. No. 95-1405 at 1.

Congress also considered the effect to be given to the actions of states that had purportedly "rescinded" their ratifications of the ERA. (Three such states, including Idaho, had purported to do so; in a fourth, a rescission resolution had been passed but vetoed.) Congress decided not to establish any mechanical rule regarding the effectiveness *vel non* of such actions but chose to leave their effect to be considered whenever three-fourths of the states had ratified. Congress also reviewed the history of states' rescissions of ratifications of prior constitutional amendments and concluded that such actions had traditionally been disregarded. *Id.* 12-16.

On May 9, 1979, the States of Idaho and Arizona and certain officials and members of their legislatures filed suit against the Administrator of GSA[5] in the United States District Court for Idaho seeking a declaratory judgment that H.J. Res. 638 was unconstitutional, that all ratifications of the proposed Equal Rights Amendment had expired as of March 22, 1979, and that the State of Idaho had validly and effectively rescinded its ratification of the proposed amendment. (Arizona has never ratified.) Plaintiffs further sought injunctive relief prohibiting defendant GSA from taking into account Idaho's purportedly rescinded resolution of ratification or any resolution adopted after March 22, 1979, in determining whether the proposed Equal Rights Amendment has been ratified by three-fourths of the States. Subsequently, four legislators from the State of Washington, which had ratified on March 23, 1973, intervened as plaintiffs.

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[5] This is the official designated by Congress to receive ratification documents and to publish any resulting amendment, together with a "certificate, specifying the States by which the same may have been adopted." 1 U.S.C. § 106b.

NOW's motion to intervene as a defendant was denied by the district court, but the court of appeals reversed. 625 F.2d 886 (9th Cir. 1980), App. N, p. 175a.

The parties filed cross-motions for summary judgment on all issues. The GSA and NOW, both also seeking dismissal of the complaint, argued that, under Article V of the Constitution and the applicable precedents of this Court, Congress has such broad authority over the amendment process that the validity of the extension and the efficacy of various state rescissions are non-justiciable political questions. Defendants further argued that these issues, even if justiciable, were not yet ripe for Article III adjudication; that, in any event, none of the plaintiffs met this Court's requirements for Article III standing; and that, even if Article III permitted such federal judicial intervention into the amendment process, this Court's criteria of prudence precluded it. Finally, defendants argued that, if the district court were nonetheless to reach the merits, the extension should be upheld as a lawful exercise of Congress' powers under Article V (particularly as supplemented by Article I, Section 8, Clause 18), and the rescissions at issue should be treated at most only as data for Congress to consider in making its ultimate judgment about timely ratification by three-fourths of the states.

In May 1981, the district court heard argument on the parties' cross-motions for summary judgment and on defendants' motions to dismiss, and over seven months later, on December 23, 1981, granted summary judgment for the Idaho legislators.[6] App. A, p. 1a. The court ruled:

1. The validity of Congress' extension of time, unlike the timeliness of ratifications, and unlike the choice between having a time limit and not having one, is a justiciable question; and, as a matter of constitutional law, the 95th Congress is bound to adhere to the time limit set by the 92d Congress for the Equal Rights Amend-

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[6] *See* n.26, p. 26, *infra*.

ment. Moreover, even if Congress could extend the time for ratification, it could not do so by less than a two-thirds vote. For each of these reasons, H.J. Res. 638 is unconstitutional and H.J. Res. 208 accordingly expired on March 22, 1979.

2. The validity and effect of state rescissions is likewise a question to be resolved by the Federal Judiciary; and, again as a matter of constitutional law, once any state has notified GSA of its rescission prior to the receipt of thirty-eight unrescinded ratifications, Congress is required to give that rescission binding effect. Thus, although Idaho's legislative rules required a two-thirds vote for both ratification and rescission, its rescission of its prior ratification by a mere majority is binding on Congress, as is that of any other state that rescinds before the unrescinded ratifications of thirty-eight states are certified to the GSA.

3. The Idaho legislators have standing to litigate all of these issues in federal court because, accepting all of their factual and legal claims as correct, the ratification and/or rescission measures for which they voted are being improperly dealt with by the GSA; and the questions posed are ripe for judicial resolution because, again accepting all of plaintiffs' factual and legal claims as correct, the answers to the questions they raise may affect what activities go on in still unratified states, as well as defendant GSA's discharge of its duties with respect to the ongoing process of recording ratifications and rescissions.

Both NOW and the GSA had moved that the judge disqualify himself on the ground that "his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), inasmuch as he held a high leadership position in a church that officially admonished its members to oppose passage of the Equal Rights Amendment and to seek rescission as a "moral issue" and that publicly condemned Congress' extension as a constitutional abuse.

App. C, at 96a, 139a-140a. The district court denied both motions, 478 F. Supp. 33, App. 166a; 507 F. Supp. 706, App. 94a, 96a, and the court of appeals declined to issue mandamus, ruling that the matter would be preserved on review of whatever final judgment the district court might render, App. 177a.[7] And the district judge, in an opinion explaining his refusal to remove himself, noted that there would be ample time for higher courts to review his final ruling. App. 172a.[8]

Given the timing of that final ruling, with legislative sessions in most of the unratified states about to begin and with many of these sessions scheduled to close shortly thereafter,[9] the time for review contemplated by the district court has, to say the least, been considerably truncated.[10]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Until the decision of the district court in this case, the process of amending the Constitution—a delicately political exercise—had never before been stopped in its tracks by a federal court. This judicial invasion of the political process, moreover, comes after thirty-five states—three short of the required number—had already ratified the particular amendment, and just before the process was

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[7] The Court's disposition of the other issues might, of course, make the resolution of the disqualification question immaterial. However, if the Court should accept NOW's argument that the district judge's "impartiality might reasonably be questioned," 28 U.S.C. § 455(a), then any possible remand of this case ought to be to another district judge, as we will show in our brief on the merits.

[8] Late in 1979, the district judge was removed from the high-ranking position that had given rise to the motion under § 455(a). The record is silent as to the reasons for his removal and as to the terms on which he might be reinstated.

[9] For example, that of Utah ends on January 31, 1982; Virginia, March 13; Florida, March 18.

[10] *See* the accompanying Motion to Expedite and Exhibit A to the declaration of Eleanor C. Smeal.

to reach its conclusion with debate and voting in numerous states that had not yet ratified. For this reason alone, the decision below warrants prompt review by this Court.

Whether the proposed Equal Rights Amendment will be duly ratified before the time set by Congress has expired on June 30, 1982, is, of course, unknowable—whether or not this Court reviews the ruling below. But this no one can doubt: It would be intolerable for the outcome of a struggle that has meant so much to so many for so long to be dictated or distorted by the unprecedented and unreviewed ruling of a single federal judge—a judge who has held that Congress, acting with the approval of the President after extensive legislative hearings on the constitutional issues involved, is barred by Article V from adding three years and three months to the time an earlier Congress had proposed for deliberation and decision on the Equal Rights Amendment.

If the modest step Congress took in this instance truly deserves to be struck down, this Court rather than an individual federal judge should deliver the fatal blow. If, as NOW urges, the blow was indefensible, this Court should seal the wound while time remains.

To recall that it is a *Constitution* we are amending is to banish all doubt that the questions here posed for the Court's resolution—or, more likely, for the Court's definitive commitment to the surveillance of Congress—are indeed too grave to be disposed of by the district court's error or by this Court's default. That the answers to those questions are clear—that each is "not of an intricacy proportioned to its interest," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)—makes expeditious decision by this Court all the more appropriate, particularly because the answers given by the court below were so clearly wrong.

Lying behind the district court's specific errors is a question that goes to the essence of the relationship

among Congress, the State Legislatures and the Federal Judiciary in the amendment-ratification process. That question is whether federal judges may second-guess the rules proposed by Congress for assuring the states a reasonable time in which to consider an amendment, and may dictate how Congress is to evaluate the efficacy of ratifications by three-fourths of the states (if and when that event should occur), demanding that Congress treat as a nullity any ratification that is later "rescinded"—even if the state's legislators apparently believed that such "rescission" was merely a non-binding signal to the House and Senate. The district court in this case not only issued these commands to Congress: It did so prematurely, while the amendment process was still underway; and it did so at the behest of state legislators who had no stake in the outcome of the lawsuit beyond that of any other concerned citizen.

In several distinct respects, such federal judicial intrusion into the ratification process erodes representative government and undermines the legitimacy of judicial review.

First, the district court claimed to be protecting state representative government, but in fact the court displaced the representative government of the Nation—Congress—with a governmental authority that is uniquely unrepresentative: the Federal Judiciary. Congress decided in 1978 that more time was needed for full deliberation on the proposed Twenty-Seventh Amendment to the Constitution, and that its earlier prescription of a seven-year period was not intended to be immutable. Congress also decided that it would address purported rescissions of state ratifications if and when the time came to tally the results of the nationwide ratification process to determine whether ratification of the proposed amendment indeed represented the contemporaneous will of all the people of the United States. Obviously, no one state can carry out these important national functions. Nor can a federal judge. In this context, state sover-

eignty is in safer hands when entrusted to the House and Senate, where the states are represented, than when turned over to federal judicial superintendence.

Second, the district court's rulings on standing, ripeness, and the political question doctrine violate important limits on the otherwise unchecked authority of the Federal Judiciary. "Relaxation of standing requirements," Justice Powell has observed, "is directly related to the expansion of judicial power." *United States* v. *Richardson*, 418 U.S. 166, 188 (1974) (footnote omitted) (concurring opinion). And "[a]n Art. III court's resolution of a question that is 'political' in character can create far more disruption among the three coequal branches of Government than the resolution of a question presented in a moot controversy." *Goldwater* v. *Carter*, 444 U.S. 996, 1005-06 (1976) (Rehnquist, J., joined by Burger, C.J., and Stewart and Stevens, JJ., concurring in judgment). This case, of course, does not involve governmental assault upon "individual citizens and minority groups" or "oppressive or discriminatory government action," *United States* v. *Richardson*, *supra*, 418 U.S. at 192 (Powell, J., concurring). Instead, the issue here is whether a federal court will supervise the "operations of the government," *id.*, on the most political of all subjects: the process of amending the national Constitution.

Third, permitting federal judicial oversight of Congress' preferred approach to structuring state consideration of the ERA would embroil the Court in the effort to override some of the Court's own gender discrimination decisions through the amendment process. In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), three Justices cautioned against the Federal Judiciary's assumption of "decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed [Equal Rights] Amendment." *Id.* at 692 (Powell, J., joined by Burger, C.J., and Blackmun, J., concurring in judgment). Given the shadow that such entanglement would inescapably cast over the legitimacy of the Court's power, the invi-

tation "to oversee the very constitutional process used to reverse Supreme Court decisions" should be accepted only with the gravest reservations. *Goldwater* v. *Carter*, 444 U.S. at 1001 n.2 (Powell, J., concurring). To leave this district court's decision undisturbed—either by direction or by delay and thus by default—is to accept that invitation far too lightly. The Court should thus act as swiftly and as comprehensively as possible to prevent that decision from continuing to cloud the amendment process. Even if only on prudential grounds, therefore, the district court should clearly have stayed its hand.

Fourth, although threshhold obstacles such as the absence of standing or the lack of a ripe controversy do not always "raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government," *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968), this case *is* one in which these difficulties (*see* Sections III-A, III-B *infra*) are symptomatic of precisely such deeper problems. Here, the absence of proper parties "to litigate these claims . . . gives support to the argument that the *subject matter* [*itself*] is committed to the surveillance of Congress, and ultimately to the political process." *United States* v. *Richardson*, 418 U.S. at 179 (emphasis added). *See also id.* at 188-197 (Powell, J., concurring). When this is so, the underlying claims might properly be held nonjusticiably political without pausing to make any initial ruling on such usually antecedent matters as standing and ripeness. *See Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 215 n.5 (1974); *DaCosta* v. *Laird*, 471 F.2d 1146, 1152 (2d Cir. 1973). Such a course seems most defensible whenever a narrower holding—that particular parties were improper or their suit premature—might simply encourage repeated judicial usurpations of an essentially political function at the instance of other plaintiffs, or at other times.[11]

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[11] For these reasons, we begin with the proposition that the *subject* into which the district court injected itself is properly and

I. WHETHER TO GIVE STATES MORE TIME TO CONSIDER AN AMENDMENT'S RATIFICATION IS A SUBJECT "COMMITTED TO THE SURVEILLANCE OF CONGRESS."

A. The Propriety of Particular Time Extensions Is a Nonjusticiable Political Question.

If one accepts the view expressly adopted by four Justices in *Coleman* v. *Miller*, 307 U.S. 433 (1939), that "Congress has sole and complete control over the amending process, subject to no judicial review," *id.* at 459 (Black, J., joined by Roberts, Frankfurter, and Douglas, JJ.), then this case is, of course, at an end and the judgment below must be reversed forthwith. But even if one regards Congress' surveillance and supervision of the amending process as subject to *some* measure of judicial review, there is no question that Congress has complete authority over questions of appropriate timing for individual state ratifications.

It is well-settled that where *no* initial time limit has been set by Congress, the tasks of determining after the fact (1) whether each state's individual ratification was timely, and (2) whether the thirty-eight ratifications taken as a whole are sufficiently contemporaneous, are for Congress alone, "not . . . subject to review by the courts." *Coleman* v. *Miller*, 307 U.S. at 454 ("Opinion of the Court" by Hughes, C.J., announced by Stone, J.,

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exclusively the political province of Congress, and that Congress has acted well within the sphere of the resulting constitutional authority. *See* Sections I and II *infra*. Only then do we turn to narrower objections: the absence of parties with genuine standing (*see* Section III-A *infra*), and the absence of a dispute ripe for adjudication by an Article III tribunal (*see* Section III-B *infra*).

An added reason to begin analysis in this case with whether the issues of extension and rescission are committed to Congress' discretion by Article V is that the standing analysis rests in part upon an understanding of the "zone of interests" Article V arguably protects. *See* pp. 26-28 & n.27, *infra*.

and joined by Reed, J.).[12] This much the district court did not question. *See* App. 46a-50a, 85a-88a. And it is equally settled that the determination of *whether* to set an initial time limit is likewise committed nonjusticiably to Congress as "a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification." *Dillon* v. *Gloss*, 256 U.S. 368, 374-76 (1921).

Surely, Congress must be equally unconstrained in choosing how best to *mix* the virtues of these two options—the flexibility of the continuing assessment allowed by *Coleman* and the clarity of the explicit time limit allowed by *Dillon*—by determining what combination of approaches best fits a particular amendment in light of the "variety of relevant conditions, political, social and economic." *Coleman* v. *Miller*, 307 U.S. at 453. Since that determination, too, "can hardly be said to be within the appropriate range of evidence receivable in a court of justice," *id.*, and "might be answered in different ways for different amendments," it, too, "must surely be controlled by political standards," *Dyer* v. *Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975) (3-judge court) (Stevens, J.), and accordingly left unreviewably to Congress.

The district court's only response was to treat *Dillon*'s authorization for "the setting of a definite time period" as designed solely "to infuse certainty into an area which is inherently vague." App. 87a-88a. But however much one might wish for certainty, there is no basis for judicially imposing it upon Congress—particularly where, as here, Congress was admittedly free in the first instance to set any time limit it wanted, or none at all. And simply because Congress initially opted for some certitude, it hardly follows that it must be compelled to stick with that choice without either change or compro-

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[12] Seven Justices—all but Justices Butler and McReynolds—subscribed at least to this proposition in *Coleman*.

mise—whatever the future might reveal. App. 88a. Not even the narrowest and most rigid notions of consistency preclude changing one's approach to a question as circumstances change. Nor does consistency require single-mindedly pursuing one aim at the expense of all others. In any event, part of the rationale for leaving these matters to Congress is that, in this area, one ought *not* seek "the kind of consistency that is characteristic of judicial, as opposed to political, decision making." *Dyer* v. *Blair*, 390 F. Supp. at 1303.

B. If Deemed Justiciable, This Extension's Validity Would Have To Be Sustained.

The foregoing reasons for treating the propriety of particular extensions as nonjusticiable political questions strongly support the conclusion that, even if subjected to judicial scrutiny, the extension enacted by Congress in H.J. Res. 638 must be upheld.

As the Department of Justice rightly stressed in opposing plaintiffs' summary judgment motion below,

> the text of the proposed ERA will, if ratified by thirty-eight States, become a part of the Constitution, which the resolving clause of H.J. Res. 208 will not . . . . [T]he initial seven year limit was placed in the resolving clause . . . . It was not included as part of the amendment proposed to the States [,] [which] have no role in [the] determination that an amendment remains vital and "responsive to the conception which inspired it." [13]

All parties knew when the ERA was initially proposed that only its text, and not the resolving clause, was being submitted (or, indeed, *could* be submitted) to the states for ratification under Article V. Even more important, anyone especially concerned to freeze the seven-year limit for all time could have insisted on inserting it into the text (as had been done with the Eighteenth, Twentieth,

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[13] Defendant's Memorandum of January 30, 1980, at 35, *quoting Coleman* v. *Miller*, 307 U.S. 433, 453 (1939).

Twenty-First, and Twenty-Second Amendments). No one did.

There is simply no basis for a claim that the seven-year language in H.J. Res. 208 conferred upon anyone a vested right to have the proposed amendment expire in seven years, much less a right that no future Congress would be free to change. Laws enacted by Congress, of course, can have no such effect: Even the personal benefits they confer "are not contractual and may be altered or even eliminated at any time." *U.S. Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 174 (1980); *Flemming* v. *Nestor*, 363 U.S. 603, 608-11 (1960). Any other rule would violate the axiom, recognized by the district court, that one "Congress' . . . determination [has] no binding effect on any subsequent Congress." App. 64a.[14]

To suppose that this principle loses its hold just because Congress is exercising Article V powers is to invest congressional action pursuant to Article V with a finality that not even fully ratified constitutional amendments possess—for even they can be unmade. *Compare, e.g.*, Amendments XVIII and XXI.[15] It is also to forget that Congress' Article V authority subtracts nothing from congressional power under the Necessary and Proper Clause of Article I. There is no support whatever in the Constitution's text, history, or structure for the district court's remarkable assertion that Congress, in dealing with amendments, "does not retain any of its traditional authority vested in it by article I." App. 85a.

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[14] Authority to amend or repeal legislation is necessarily retained by Congress in all cases. *See, e.g.*, Glidden Co. v. Zdanok, 370 U.S. 530, 534 (1962) (plurality opinion); Butler v. Pennsylvania, 51 U.S. (10 How.) 402, 416-417 (1850).

[15] To be sure, undoing an amendment is a uniquely burdensome process. But the court below held that there was literally *nothing* the 95th Congress could do, by *any* vote, to extend the time limit proposed by the 92d Congress. App. 88a.

On the contrary, Article I, Section 8, empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution" both the specific legislative powers granted to Congress elsewhere in Article I and "*all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Emphasis added.) Among such "other Powers" is, of course, the power vested in Congress itself by Article V. Thus, measures that are passed by both houses and signed by the President to facilitate Congress' discharge of its Article V responsibilities find support not only in Article V itself but also in the Necessary and Proper Clause of Article I.[16] But all Article I enactments follow Jefferson's rule that "The majority decides . . . where not otherwise expressly provided." JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE, § XLI, *reprinted* in H.R. DOC. NO. 93-416, 93d Cong., 2d Sess. 257 (1975).[17] And there is no basis whatever in the language or background of Article V to suggest that Article I enactments which address "matter[s] of detail" in the management of ratification, *Dillon* v. *Gloss*, *supra*, 256 U.S. at 376, unlike the actual decision

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[16] Whether Congress expressly invoked the Necessary and Proper Clause in enacting H.J. Res. 638 is immaterial. *See* Woods v. Miller Co., 333 U.S. 138, 144 (1948) ("constitutionality of an action taken by Congress does not depend on recitals of the power which [Congress] undertakes to exercise").

[17] The historical evidence strongly indicates that a two-thirds majority is required only with respect to the substance of an amendment. Since 1789, when the Eleventh Amendment was first proposed, Congress has required a two-thirds vote only on the final proposal. All preliminary votes have proceeded on the premise that a simple majority would suffice. *See* 1 ANNALS OF CONGRESS 717 (1789). *See also* Note, *The Constitutional Law of Constitutional Amendments*, 26 NOTRE DAME LAW. 185, 192 (1951). In the resolution declaring ratification of the Fourteenth Amendment, there is no indication that there was super-majority approval. 15 Stat. 709, 709-10 (1868); 81 Cong. Globe 4266 (1868).

to propose an amendment to the states, require a two-thirds vote while other Article I enactments do not.[18]

Thus, whether seen entirely as an exercise of Congress' powers under Article V or understood as authorized by the combination of Article V with Article I, Section 8, Clause 18, the extension of time in H.J. Res. 638 fell comfortably within Congress' delegated authority and infringed no right conferred by Article V or by any other constitutional provision.

II. WHETHER TO GIVE EFFECT TO STATE REJECTIONS AND/OR RESCISSIONS OF A PROPOSED AMENDMENT IS LIKEWISE A MATTER COMMITTED TO CONGRESS.

A. The Weight To Be Given To State Rejections Prior To Ratification, Or To State Rescissions Subsequent To Ratification, Is A Political Question Inseparable From Other Nonjusticiable Aspects Of Congress' Supervision Of The Ratification Process.

This Court specifically stated in *Coleman* that "the efficacy of ratifications by state legislatures, in the light of previous rejection *or attempted withdrawal*, should be regarded as a political question . . . , with the ultimate authority [belonging to] Congress in the exercise of its control over the promulgation of the adoption of the amendment." 307 U.S. at 450 (emphasis added). There is no reason to doubt that the efficacy of rescissions is a question that quite properly "might be answered in different ways for different amendments," *Goldwater* v. *Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring in judgment) (*quoting Dyer* v. *Blair*, *supra*, 390

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[18] If Article V gave Congress no power to deal with the "mode of ratification," that power would be readily supplied—and indeed would have to be supplied—by the Necessary and Proper Clause. There is no reason to reach a different result because Article V *does* give Congress this power to prescribe "matter[s] of detail" relating to the "mode of ratification," *Dillon* v. *Gloss*, *supra*, 256 U.S. at 376.

F. Supp. at 1302)—depending upon the number, timing and circumstances of all rejections and rescissions in the context of the sequence of ratifications; upon the length of time an amendment has been open to state-by-state consideration; and, indeed, upon the full range of "relevant conditions, political, social and economic [as to] which it would be an extravagant extension of judicial authority," *Coleman* v. *Miller*, *supra*, 307 U.S. at 453-54, for courts to second-guess Congress.[19] These surely are "matter[s] of detail . . . incident . . . to . . . the mode of ratification." *Dillon* v. *Gloss*, *supra*, 256 U.S. at 376.

Addressing equally rejections prior to ratification and rescissions subsequent to ratification, the *Coleman* Court observed that "Article V, speaking solely of ratification, contains no provision as to rejection." 307 U.S. at 450 (footnote omitted). In holding that the President's authority to terminate a treaty without the Senate's consent poses a nonjusticiable political question, four Justices in *Goldwater* v. *Carter*, *supra*, 444 U.S. at 1005 (Rehnquist, J., joined by Burger, C.J., and Stewart and Stevens, JJ., concurring in judgment), reasoned that the Constitution's silence on the issue of treaty termination made the situation "closely akin to that presented in *Coleman*, where the Constitution spoke only to the procedure for ratification of an amendment, not to its rejection." The district court, having recognized in this very case "that the Constitution is silent" on the rescission matter, App. 60a, and that it is Congress that must exercise the "role of orchestrating the expressions of the states . . . under its power [over] the mode of ratification," App. 49a, should have concluded that the effect to be accorded state rejections, both pre- and post-ratifica-

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[19] It would be hard to imagine a more quintessentially political task than that of determining, for example, how seriously a purported rescission should be taken where it was obtained in apparent violation of a state's own voting rules and appears, for that reason and others, to have been voted less as an official act than as an advisory message to Congress. *See* n.25, p. 24, *infra*.

tion, can be determined only at a national level, and can be determined more appropriately by Congress than by the Federal Judiciary. For the issue plainly involves "criteria of decision that necessarily escap[e] the judicial grasp." *Baker* v. *Carr*, 369 U.S. 186, 214 (1962) (footnote omitted) (reaffirming both *Dillon* and *Coleman*).

The only competing consideration put forth by the district court, once that court's analysis is pared to its essentials, is that "it is the exclusive role of the states to determine what the local sentiment is," and that "it logically follows that [recognizing] the subsequent act of rescission would promote the democratic ideal by giving a truer picture of the people's will as of the time three-fourths of the states have acted in affirming the amendment." App. 80a (footnote omitted).

With all respect, that analysis wholly misses the point. Even if each state legislature may "determine for itself" the "means [by which it] shall decide to consent or not to consent" on a particular occasion, *Dyer* v. *Blair*, *supra*, 390 F. Supp. at 1307, this means that a state wishing to transmit the latest "picture of the people's will" might be free, for instance, to take several tentative votes, or to defer any official vote until the final year, or to delay its decisive vote until other states have acted on the matter. But it is not even possible for each of fifty states to "determine for itself" the approach to be followed in deciding whether a *combined* total of thirty-eight states have filed timely consents to a given measure. Some states, for example, might prefer a rule under which the tally grows by one each time a new consent is filed and is never reduced by negative votes, which are always treated as internal or tentative from the point of view of the whole. Others might prefer a rule under which the national tally is permitted to shift back and forth without limit as positive and negative votes are registered, with no constraint on vote-switching and with each state's latest official vote cancelling whatever went

before. Still others might opt for a rule under which each state's first registered vote, whether positive or negative, represents that state's only opportunity to affect the tally—a tally which, under such a rule, could never reach thirty-eight if more than twelve states had cast negative votes.[20]

The choice among these and other competing approaches to the "mode of ratification"—and, indeed, even the choice of whether to settle upon a specific approach at the start of the process for any given amendment or instead to leave the matter open until thirty-eight consents are on record and a judgment of timeliness is being made—cannot be left simultaneously to each of the several states but must, as a matter of simple logic, be made by a single, and thus a national, authority. The *most* that might be left for decision by the several states acting separately is the internal question of what steps must occur for that state to register a vote of "yes" or "no".[21] But how a series of separate state votes is to be *accumulated* could not be left to the states to decide separately, given the lack of any guarantee that all would reach the same decision, lest the amendment process be reduced to a game with no rules and no umpire—or, more accurately, to fifty separate games that are not part of any common tournament.

The only matter that is genuinely open, therefore, is whether the single body to which the decision must be entrusted should be Congress or the Federal Judiciary. And that is the very matter addressed by *Coleman*, where this Court stated that such authority belongs to Congress alone under Article V.

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[20] The district court considered these three alternatives and chose the one it thought most appropriate. App. 76a-84a.

[21] Even on that question, this Court has ruled out at least some internal rules. *See, e.g.*, Hawke v. Smith No. 1, 253 U.S. 221 (1920); Hawke v. Smith No. 2, 253 U.S. 231 (1920).

B. If The Issue Were Deemed Justiciable, Any Rescission In This Case Would Have To Be Ruled Wholly Ineffectual or At Most Purely Advisory.

The district court's review of the history of prior amendments led it to conclude that "Congress has not come to any conclusion regarding the question of rescission." App. 72a. But if that history is more fairly described, it shows that Congress has never given effect to any state's rescission.[22] This may reflect a view that permitting states to vacillate would undercut the seriousness and sense of moment with which Article V duties should be approached and discharged, or that the constitutional mandate of two-thirds to propose and three-fourths to approve is itself sufficiently difficult that no added obstacles are appropriate.[23] Accordingly, this Court in *Coleman* took the history as establishing the constitutional irrelevance of any rescission "in the presence of an actual ratification." 307 U.S. at 449 (footnote omitted).

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[22] Although the district court disagreed with this reading of the history as developed in *Coleman* v. *Miller*, *supra*, 307 U.S. at 448-50 (*see* App. 66a-71a), the record amply vindicates this Court's historiography. Thus, both Ohio and New Jersey passed resolutions rescinding their ratifications of the Fourteenth Amendment—but Congress nonetheless declared the amendment to be ratified, by counting the votes of both Ohio and New Jersey. Without ratifications from those two states, the amendment would have been one state short of the necessary number of ratifications. As the district court points out, Georgia did ratify on the same day that Congress declared the Fourteenth Amendment to be part of the Constitution. But while the House apparently had unofficial notice of Georgia's action when it acted, *see* 81 Cong. Globe 4295-96 (1868), the Senate clearly did not, *see id.* at 4266, and neither house included Georgia on the list of ratifying states.

[23] In the last two hundred years, over 5,000 amendments have been proposed to Congress, *see* PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. DOC. No. 163, 87th Cong., 2d Sess. IV (1963); apart from the Bill of Rights, only 16 proposals have succeeded in being ratified. Indeed, it took from 1923 to 1972 for Congress simply to decide to propose an Equal Rights Amendment to the states.

Efforts in Congress to authorize rescissions, either by amending Article V to legitimate such action or by enacting appropriate enabling legislation, likewise suggest a widely shared assumption that, at least until such changes have been made, official ratifications communicated to GSA cannot be viewed as straw votes or trial balloons.[24]

Rescission votes taken against this background, whether by Idaho or by any other state, cannot properly be construed as more than "messages to Washington"—signals of disaffection unlikely to have been regarded as binding actions even by their own sponsors and supporters.[25] To transform such signals into directions decisive-

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[24] That was surely the understanding in 1924, when Senator Wadsworth and Congressman Garrett unsuccessfully sought to amend Article V to permit state rescissions, *see* 65 Cong. Rec. 4493 (1924); 66 Cong. Rec. 2159 (1925); and in 1971 and 1973, when bills were unsuccessfully introduced to permit rescissions, *see* S. REP. No. 336, 92d Cong., 1st Sess. 14 (1971); S. REP. No. 243, 93d Cong., 1st Sess. 14 (1973).

[25] Indeed, the Idaho legislature acted after that state's Attorney General had issued several opinions that rescission would be invalid. *See, e.g.*, Opinion No. 73-116 ("ratification . . . is a final action which cannot be repealed or revised. . . . [A]ttempts . . . to retract . . . prior ratification would be of no legal effect"). The most recent of the Idaho Attorney General opinions, expressed in a letter dated February 12, 1975, to Senator Edith Miller Klein, suggests that "rescission is not a totally useless gesture, because it would at least give the Idaho Legislature standing to argue its case to . . . Congress and possibly the courts." This background may help to explain why the legislature did not even adhere to its own rule requiring a two-thirds vote.

Although the record contains nothing regarding the circumstances surrounding other states' efforts to retract their ratifications, the district court held that all such efforts were equally binding on Congress. App. 93a. Had such a record been made, it would likewise have shown that these states similarly acted in the face of official advice that what they were doing lacked legal effect. *See, e.g.*, Opinion Letter No. OAG 73595 (Kentucky Attorney General Hancock) (Aug. 13, 1973) (rescission "would simply be ignored"); Opinion Letter from Counsel William Heckman to Nebraska State

ly erasing the solemn ratifications that preceded them would subject Congress to a form of state-by-state control hardly more likely to have been expected by the rescinding states than contemplated by Article V's Framers.

Were the Court to treat the validity and efficacy of the rescissions in this case as justiciable, it would therefore have to conclude either that such rescissions are null and void, or at least that Congress need give them no more weight than the circumstances call for. The latter outcome, it should be stressed, would for all practical purposes replicate the results of holding the status of rescissions to be a political question committed unreviewably to Congress' surveillance—the very holding urged by appellants in Section II-A, *supra*.

III. THE DISTRICT COURT INTERVENED AT THE BEHEST OF PARTIES WITHOUT STANDING, AND IN THE ABSENCE OF ANY RIPE CONTROVERSY.

From all of the foregoing, it follows that the district court entered a forbidden political thicket, seeking to direct Congress with respect to matters entrusted wholly to Congress' discretion, both as to the extension and as to rescission. The district court's error is exposed as all the more egregious when one focuses on the specific litigation context in which it took these extraordinary steps—a context suggestive of a court delivering an advisory opinion rather than a court resolving constitutional issues incident to deciding a live dispute between individuals with a personal stake in the outcome. Parts A and B make that observation more precise.

Senator Shirley Marsh (Feb. 20, 1973); Testimony of South Dakota Attorney General (now Governor) William Janklow (1976-77); Opinion Letter of Tennessee Assistant Attorney General Robert H. Roberts to State Rep. Victor H. Ashe (March 13, 1973) (ratifications of prior legislature are "irrevocable").

A. The Plaintiffs Lack Standing.

The district court granted standing here to just one group of plaintiffs: a group of Idaho legislators, some of whom had voted for the initial Idaho ratification of the proposed ERA, some for the later Idaho rescission, and some for both. The basis for standing was "impairment of [their] vote[s]"—whether by giving their ratification votes effect beyond the initial March 1979 date, or by not giving effect to their rescission votes. App. 17a-18a. Granting standing to these legislators, the lower court found, was sufficient to dispose of all the issues presented. App. 23a-24a.[26]

Whenever standing in an Article III court has been accorded to legislators on a "vote impairment" theory, one of two tests has been met. Either the legislator has effectively been denied his right to vote at all on a mat-

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[26] The analysis in text would apply with equal force to the legislators from Arizona and Washington, for neither group of which the district court found it necessary to analyze standing.

The other plaintiffs whose standing the district court found it unnecessary to reach—states that ratified and then rescinded the ERA (Idaho), allegedly ratified on condition that the ERA would become law by March 22, 1979 (Washington—not itself a party, but the source of several legislators who are), or rejected the ERA in succeeding votes (Arizona)—are plainly without standing here. For the interests they claim in being definitively told the ERA is dead (and has been since March 1979), or in being decisively recorded as having helped kill it (by their rejection or rescission votes), are not even "arguably within the zone of interests [secured by Article V]," Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970), which is the only possible source of the constitutional rights such states invoke in this litigation. As this Court observed in Coleman v. Miller, 307 U.S. 433, 450 (1939), "Article V, speaking solely of ratification, contains no provision as to rejection." *See* Section II-A *supra*. In more contemporary parlance, Article V simply does not confer, and does not authorize federal judges to imply, a cause of action for any state to halt an ongoing process of ratification, or to enforce that state's determination to withdraw from that process without awaiting the final tally.

ter within his jurisdiction, or he has been denied a right to have his vote properly weighed, counted, and duly merged in the collective result of the legislative body to which he belongs.[27] But to "grant [standing] on the

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[27] Goldwater v. Carter, 444 U.S. 996 (1979) (*per curiam*), proceeded on the first theory: Senator Goldwater claimed that he had been denied his right to vote on termination of our treaty with Taiwan. *Coleman* v. *Miller*, *supra*, proceeded on the second: the twenty Kansas legislators who had there voted against ratification, and whose votes would have been sufficient had the Lieutenant Governor not intervened, were found to have standing because their "votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification . . . . [T]he twenty senators were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being a part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution." 307 U.S. at 438, 441. Indeed, even on these facts, four members of the Court in *Coleman* were of the opinion that the plaintiff legislators lacked standing. *See* 307 U.S. at 464-65 (Frankfurter, J., concurring). *Goldwater* involved the right to vote, *Coleman* the proper weighing of individual votes in forming the collective judgment, the legislature's formal action.

Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), heavily relied upon by the court below, proceeded upon both theories. In that case, Senator Kennedy challenged the President's "pocket veto" of legislation for which he had voted. The court granted standing to Senator Kennedy on the ground that either a pocket veto did not in fact amount to a veto, in which case the bill should have become law, or it did, in which case Senator Kennedy had been denied his right to vote to override the President's veto.

The lower courts have been careful to distinguish cases like *Goldwater*, *Kennedy* and *Coleman*, where standing resulted from abridgement of the claimed right to vote or have one's vote properly counted, from situations where a legislator invokes a *continuing tie* to legislation on which he once voted to claim standing in litigation over the constitutionality or proper construction of such legislation after it has left the legislative body. Thus, in Harrington v. Bush, 553 F.2d 190, 213 (D.C. Cir. 1977), the same court which decided *Kennedy* v. *Sampson* was careful to point out that "votes have not been nullified or diminished in force because of [undesired] post-enactment" acts or omissions affecting, or based upon, the measures previously voted for. "Once a bill becomes law,

ground of the members' participation in enacting [a] law [that is later challenged] would involve accepting as a principle that each [legislator may] intervene in every case in which the . . . constitutionality . . . [or] interpretation of a . . . statute was in question." *McRae* v. *Mathews*, 421 F. Supp. 533, 540 (E.D.N.Y. 1976), *appeal dismissed sub nom. Buckley* v. *McRae*, 433 U.S. 916 (1977).

This no court had ever done—until the decision by the lower court in this case.

The plaintiff legislators in this case were not denied their right to vote as legislators. *Compare Trombetta* v. *Florida*, 353 F. Supp. 575 (M.D.Fla. 1973). All were allowed to vote, whether for ratification or for rescission or for both. Nor were plaintiffs denied any right to have their votes properly counted toward the result of their state's legislative process. There is no claim that their votes were nullified by any erroneous tie-breaking vote or any wrongful veto. *Compare Coleman* v. *Miller*, *supra*. Quite the contrary, they were given their full and proper weight in determining the passage of the state resolutions on which they bore. *Compare Dyer* v. *Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (3-judge court).

The only claims raised here relate to the construction to be accorded by Congress or the GSA to the resolutions already adopted by the Idaho legislature, and to the constitutional status of those resolutions in a national forum. What plaintiffs obviously fear is that the ERA will be ratified in time by thirty-eight states, and that their

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any injury which is inflicted" on its sponsors in the course of the law's operation "would seem to fall equally on all citizens," and is thus " 'a generalized grievance about the conduct of government.' " *Id.* at 213, 214, *quoting* Flast v. Cohen, 392 U.S. 83, 106 (1968).

Similarly, in McRae v. Mathews, 421 F. Supp. 533, 540 (E.D.N.Y. 1976), *appeal dismissed sub nom.* Buckley v. McRae, 433 U.S. 916 (1977), the court pointed out that, in cases like *Kennedy*, "the litigation is addressed to establishing the efficacy of the legislator's vote as a vote to be counted in the legislative process."

resolutions and intentions will then be "misconstrued" in the case of ratifications prior to the extension, or "nullified" by being denied effect in the case of rescissions. Surely, they would be disappointed. But their position would be no different from that of *any* group of disappointed legislators or other citizens who see a statute they worked hard to enact treated as null and void by judicial or executive authorities or construed by a court or agency in a manner they deem inconsistent with their original intentions. The individuals against whom such invalidation or interpretation is directed would typically have standing to challenge it. The legislators who had voted for the statute, like the citizens who had lobbied for it, would not.[28]

Yet under the district court's decision, those legislators—and all other legislators disappointed by the implementation or invalidation of a statute for which they had voted (or by the validation of a statute *against* which they had voted)—could have recourse to the federal courts.[29] For that is the only potential "vote impairment" presented by this case. Having voted, and having had their votes properly counted, the legislators in this case complain only of what conclusions might be reached as to the meaning, effect, or constitutionality of the resolutions they joined in enacting.

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[28] Ironically, the only possible exception in this case would seem to be presented by the case of Idaho legislators who voted against that state's rescission, who disagree with Idaho's shift from a two-thirds rule for ratification to a majority rule for rescission, and who might allege that this shift, like the lieutenant governor's vote in *Coleman* or the three-fifths role in *Dyer*, deprived their votes of the effect in Idaho to which such votes were constitutionally entitled.

[29] Notably, the district court in this case, while accepting the "vote impairment" argument of the Idaho legislators, denied intervention to 79 members of Congress to defend the constitutionality of the extension legislation for which they had voted—on the ground that they had nothing significant to add to the litigation. *See Idaho* v. *Freeman*, No. 79-1079, Memorandum Decision (D. Idaho, Jan. 21, 1980) (Callister, J.).

But even if this Court were to decide—for the first time—that the "vote impairment" occasioned by legislative interpretations or rulings of legislative validity inconsistent with the views of the voting legislator were sufficient to confer Article III standing, the plaintiffs in this case would still fail to meet the requisite test. For the simple fact of the matter is that no one's vote has been impaired even in this Pickwickian sense; and no legislator has suffered even a genuine frustration of intent. As of now, quite simply, *nothing has happened.* The GSA has made no proclamation. And Congress certainly has not decided to promulgate the ERA. The votes of these Idaho legislators will not even arguably be impaired unless and until they are counted as among at least thirty-eight ratifying states in the amendment process. That has not yet happened; it may *never* happen. Thus, not only do these plaintiffs fail to make out a case of injury to an arguably protected interest; any injury of which they complain is, at best, wholly speculative and hypothetical.[30] And under the decisions of this Court, no less applicable to legislators than to private parties, "a bare possibility of some injury in the future," *Gange Lumber Co.* v. *Rowley*, 326 U.S. 295, 305 (1945), is insufficient to confer standing in the present.[31]

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[30] Exactly the same is true of those Idaho legislators who voted to ratify, did *not* later vote to rescind, and might now claim to be upset because the efficacy of their votes in assuring Idaho a permanent place in the roster of ratifying states has not yet been decisively proclaimed by Congress or the GSA.

[31] Nor is it any answer that if these plaintiffs are not granted standing, important legal issues will remain unresolved. There is no question that the legal issues presented here are important to all Americans—state legislators, members of Congress, and individual citizens. But that alone does not confer standing on anyone. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226-227 (1974). Nor are these issues ones which will inevitably evade review. If and when the ERA is declared the Twenty-Seventh Amendment and is actually enforced, individuals adversely affected by it will have the right to challenge its adoption. *Cf.* Hollings-

B. There Was No Ripe Controversy.

Between now and June 30, 1982, three or more states might join the thirty-five that have thus far ratified the Equal Rights Amendment. If fewer than three do so, it will make no difference whether the extension legislation was unconstitutional; the ERA will have expired in any event. If more than eight additional states ratify, it will make no difference whether rescissions are valid; the requisite thirty-eight states will have ratified even if as many as five are counted as having validly rescinded.

The rule against anticipating "a question of constitutional law in advance of the necessity for deciding it," *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 72 (1961), "represents a conception of the role of the judiciary in a government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely," *id.* This principle is of special importance where, as here, the real issue involves a potential conflict between two of the great political divisions of our governmental system—the National Legislature and the States. As to the rescission issue in particular, Congress has yet to reach any decision at all; when enacting the extension struck down below, Congress took care to defer the question of how rescissions would be regarded until thirty-eight ratifications had been received. *See* H.R. REP. No. 95-1405, 95th Cong., 2d Sess. 12 n.8 (1978). As in *Goldwater* v. *Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring), "Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual confrontation . . . ."

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worth v. Virginia, 3 U.S. (3 Dall.) 378 (1798); National Prohibition Cases, 253 U.S. 350 (1920); Dillon v. Gloss, 256 U.S. 368 (1921).

To create a current controversy out of what is, in essence, an anticipated clash of wills—a clash that might never occur—plaintiffs and the district court focused on the insistence of Idaho lawmakers that their state's ratification be erased *now*, its ratification certificate returned at once, and only the state's rescission vote be recorded by GSA. The GSA has, indeed, recorded that vote; there is not, and could not be, any claim that Idaho's rescission, or any other action of any plaintiff, is being ignored or might simply be forgotten if and when it becomes relevant to any national decision or action.

The district court specifically found that, as of now, the GSA merely keeps two "lists," on which Idaho is noted—quite accurately—as having submitted both a certificate of ratification and a notice of its vote to rescind. App. 27a-28a. Surely the GSA's practice of keeping two lists rather than one creates no "constitutional impasse" even remotely requiring resolution by a federal court. *Goldwater* v. *Carter*, 444 U.S. at 997 (Powell, J., concurring). The trumped-up debate over that question is nothing more than the kind of "abstract disagreement" which need not and should not be addressed "until [a] decision has been formalized." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967). For the simple fact is that *neither* of these lists matters in the least. If and when thirty-eight states have ratified the ERA, the two lists will have no effect different from what plaintiffs seek by demanding that one be kept instead: It is not the lists kept by the GSA, but ratification by thirty-eight states or final proclamation at Congress' command, that is the critical last step in the process.[32]

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[32] While the district court *assumed* that the GSA exercised some discretionary power in keeping its two lists, App. 22a-23a, the court of appeals, in an earlier opinion in this case, specifically stated that the GSA is "the agency which performs *ministerial tasks* in connection with the amendatory process," 625 F.2d at 887, App. N, p. 175a (emphasis added). *See also* United States *ex rel.* Widenmann v. Colby, 265 F. 998, 999 (D.C. Cir. 1920), *aff'd sub nom.* United States v. Hughes, 257 U.S. 619 (1921) (action of Secretary

Nor is the requirement of waiting until that point productive of unfair hardship or undue uncertainty. There is, after all, a *date certain* on which a ripe controversy worthy of identification as such will either be presented or precluded. If thirty-eight states ratify by next June 30, no ripeness problem will remain. Until then, there is nothing here beyond a dispute over the form of lists maintained by the GSA. And for the district court to resolve weighty constitutional issues on the basis of so ephemeral a dispute was to transform constitutional decision-making into "an arid ritual of meaningless form." *Staub* v. *City of Baxley*, 355 U.S. 313, 320 (1958).[33]

The only answer offered below to the ripeness argument has been the observation that courts have in the past decided cases bearing on the amendment process without waiting for final ratification by three-fourths of the states. App. 26a. On analysis, however, each of those decisions is readily distinguishable, for each was occasioned by an apparently ripe controversy over the legality of a specific action bearing directly upon the outcome of a particular state's ratification process[34] rather than by

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of State in collecting ratifications is "purely ministerial"). The statute governing the duties of the Secretary of State contained substantially the same provisions as does 1 U.S.C. § 106b, governing the duties of the GSA. *See* 265 F. at 999.

[33] *Cf.* Field v. Clark, 143 U.S. 649, 671 (1892) (bill's constitutional status as enacted, binding law does not depend on whether journals of House or Senate confirm that text of bill, as signed by presiding officer of each house and as approved by President, was identical to text as passed by each house).

[34] *See* Coleman v. Miller, 307 U.S. 433 (1939) (mandamus sought against Secretary of State of Kansas to erase an endorsement where tie-breaking vote in the State Senate had been cast by the lieutenant governor); Hawke v. Smith No. 2, 253 U.S. 231 (1920) (binding public referendum prohibited); Hawke v. Smith No. 1, 253 U.S. 221 (1920) (constitutionality of Ohio provision requiring approval through public referendum, challenged after state legislative approval of the proposed 18th amendment); Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (3-judge court) (constitutionality of

a premature interest in how an ongoing sequence of ratifying or rescinding decisions might ultimately be combined into a national total.

In this case, by contrast, Idaho's legislators make no claims regarding the procedures by which the state first ratified and later rescinded the ERA. Their sole concern, once one gets past the trivial "dispute" over the format of the GSA's lists, is with the rules governing the national tally—a future step in the ratification process, and *a step that might never be reached.* The only genuine claims made by the legislators in this case thus relate to rules yet to be applied, and duties yet to be triggered.[35]

The complaint in this case was brought for a number of reasons. Some of the plaintiffs, including the leadership of the Idaho Senate, were concerned with "legislative time and budget" and did not want to waste time

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Illinois super-majority requirement where a majority of the legislature had ratified); Trombetta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973) (constitutionality of Florida's intervening election requirement). *Cf.* Kimble v. Swackhamer, 439 U.S. 1385 (1978) (Justice Rehnquist refused to reverse a state court decision permitting a non-binding popular referendum on the ERA). *Compare* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (decided *after* challenged amendment's promulgation); Hawke v. Smith No. 1, 253 U.S. 221 (1920) (same); National Prohibition Cases, 253 U.S. 350 (1920) (same); Dillon v. Gloss, 256 U.S. 368 (1921) (same); Leser v. Garnett, 258 U.S. 130 (1922) (same).

[35] Dyer v. Blair, 390 F. Supp. 1287 (N.D. Ill. 1974) (3-judge court), is particularly instructive in this regard. There, the court twice refused, on ripeness grounds, to reach any decision at all as to the super-majority required in the Illinois legislature to ratify an amendment. Instead, the court found the case unripe for review until both houses of the state legislature had voted, and all the steps necessary for state ratification had been completed. If, as Justice Stevens observed when sitting as a circuit judge in *Dyer*, "federal judges . . . may not participate in preliminary stages of a State's legislative process" while an amendment is pending, *id.* at 1289, then surely federal judges may not inject themselves into preliminary stages of the ongoing political process of cumulating state ratification (and rescission) decisions on the national level.

on issues that need not be resolved.[35] Others wanted to know "what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)—or at least what the result would be if the ERA secured thirty-eight votes of ratification. What all the plaintiffs had in common was a desire for the advice of the district court: advice as to how they should spend their energy, as to whether a resolution they might consider would be valid, as to how their prior acts might ultimately be counted. What they were seeking, quite simply, was an advisory opinion by the court as to an amendment that has yet to be ratified. *See, e.g.*, Burton S. Barr dep. tr. 33, 37, 44-45. The language of this Court in *Fairchild* v. *Hughes*, 258 U.S. 126, 129-30 (1922), is worth recalling:

> "Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute if passed, or a constitutional amendment about to be adopted, will be valid."

CONCLUSION

This case is neither about the merits of the Equal Rights Amendment, nor about the wisdom of extending the period for its ratification, nor even about the soundness of giving effect to state rescissions. At stake is the intrusion of the Federal Judiciary into the political process set in motion and supervised by Congress for addressing these very matters. Unless full, prompt review is granted by this Court, the amendment process will have been derailed by a single federal judge—without the prompt review expressly contemplated by 28 U.S.C. §§ 1254(1) 2101(e). For these reasons, and "to ensure

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[35] *See* Plaintiffs' "Exhibit A" to the Complaint for Declaratory and Injunctive Relief (letter from Senate leadership to Idaho Attorney General).

that resolution of a 'political question,' which should not have been decided by a lower court, does not 'spawn any legal consequences.'" *Goldwater* v. *Carter*, *supra*, 444 U.S. at 1005 (Rehnquist, J., joined by Burger, C.J., and Stewart and Stevens, JJ., concurring in judgment), the writ of certiorari should be granted without delay, the case set for expedited briefing and argument, and the judgment below set aside.

Respectfully submitted,

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January 8, 1982

Supplemental Brief

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

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FILED
JAN 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1283

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Petitioners,

v.

STATE OF IDAHO, et al., Respondents.

ON PETITION FOR CERTIORARI BEFORE JUDGMENT TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO EXPEDITE

Petitioners hereby move for expedited review of a district court decision (a) holding unconstitutional Congress' action extending the period for ratification of the Equal Rights Amendment to June 30, 1982, and (b) declaring that any state that ratifies a constitutional amendment may require Congress to disregard that ratification by a subsequent vote of "rescission". No federal court has ever before invalidated any part of an amendment ratification process prescribed by Congress. This motion is made on the grounds that only expedited review can vindicate the integrity of the amendment process, respect the aims of actions taken by Congress in that process, and effectuate the congressional provisions for appellate review by this Court; only expedited review can restore, before it is too late, the final period of unobstructed deliberation and voting enacted by Congress for consideration of the Equal Rights Amendment; and only expedited review can remove the confusion spawned by the district court's unprecedented and misguided intrusion into political matters that should be left alone by the Federal

Judiciary. See Declaration of Eleanor C. Smeal submitted herewith.

We respectfully request that the Court promptly grant the petition for certiorari before judgment, see S.Ct. R. 18, and set the case down for briefing and argument on an expedited schedule.

STATEMENT

The proposed Equal Rights Amendment (ERA) is scheduled to expire on June 30, 1982. Thirty-five states have thus far ratified the Amendment. Thirty-eight must do so by June 30 for it to become part of the Constitution. H.J. Res. 638, 95 Stat. 3799, 95th Cong., 2d Sess. (1978).

On December 23, 1981, on the eve of the long-awaited and much planned-for final ratification debates in many still undecided states, and more than seven months after hearing argument in this case, the United States District Court for the District of Idaho held unconstitutional the Act of Congress, H.J. Res. 638, which extended the time for deliberation and ratification of the ERA from March 22, 1979, until June 30, 1982. This decision represents the first time in our history that a federal court has declared unconstitutional an Act of Congress dealing with the process of amending the Constitution. And the court did not stop there. In what must be regarded as an advisory opinion (since the court had already pronounced the ERA dead), the district court went on to hold that when states "rescind" their prior ratifications of the proposed Equal Rights Amendment, those ratifications are nullified and may not be counted.

The National Organization for Women (NOW), defendant-intervenor in the court below, is today filing a

petition for certiorari before judgment to the United States Court of Appeals for the Ninth Circuit and is also filing a jurisdictional statement seeking a direct appeal under 28 U.S.C. § 1252.

In this motion, NOW respectfully urges the Court to grant expedited consideration of NOW's petition -- both as to the granting of certiorari itself, and as to the briefing and argument to follow. In particular, NOW asks the Court to grant certiorari before judgment at its January 15 conference and at that time to set an expedited schedule for briefing and argument, with opening briefs to be filed and exchanged simultaneously no later than 3 p.m. on January 25, any reply briefs to be filed and exchanged no later than 3 p.m. on January 29, and oral argument to be scheduled for a special session on February 4, or as soon thereafter as is consistent with the Court's calendar.

Petitioners are authorized to state that respondents, plaintiffs and plaintiffs-intervenors below,[1/] consent to the grant of certiorari by this Court on January 15 or as soon thereafter as possible, and to the Court's announcement of an expedited schedule for briefing and argument. Respondents do not, however, accede to the precise schedule proposed above and will suggest a schedule of their own.

SUMMARY

NOW's position is a simple one: not only did the district court violate Article III by deciding this case at all, but it wholly misapplied the political question doctrine and misconstrued Article V in holding Congress' extension

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1/ These parties are listed in the Jurisdictional Statement in No. 81-1282 at p. ii, n.*.

unconstitutional and in ruling rescissions to be binding on Congress. See Petition for Certiorari.

This is not just a case of an erroneous decision by a district court. That alone, we recognize, would not justify expedited review. But in this case, the timing of the district court's decision was such that it is only through expedited consideration that the legitimate policy of Congress can be effectuated, the integrity of the amendment process be maintained, "the large public interest in allowing . . . political processes to function free from judicial supervision" be vindicated, O'Brien v. Brown, 409 U.S. 1, 5 (1972), and the right of expedited review under 28 U.S.C. §§ 1254(1) and 2101(e) be made meaningful.

In sum, without expedited consideration the ERA could well expire on June 30, 1982, simply because debate was distorted by a clearly erroneous decision of a federal district court. And at that point, the review in this Court made available by Congress will be utterly worthless.

ARGUMENT

I. SECTION 1254(1)'s ASSURANCE OF SUPREME COURT REVIEW CAN BE REALIZED IN THIS CASE ONLY IF THE CASE IS CONSIDERED IMMEDIATELY.

Congress has assured through 28 U.S.C. §§ 1254(1) and 2101(e) a policy of immediate review in this Court in cases of public importance. "No one can accurately point to a case in which the Supreme Court has failed to give expedited review when circumstances warranted that action." Burger, Annual Report on the State of The Judiciary, 62 A.B.A.J. 443, 444 (1976), quoted in R. Stern & E. Gressman, Supreme Court Practice 54 n.3 (5th ed. 1978). Expedited review is plainly proper where, as here, the

very pendency of the district court's sweeping decision -- even if eventually vacated or reversed -- destroys precisely what the Act of Congress struck down below was intended to create: a final spring for unobstructed deliberation and voting on the ERA. Indeed, the June 30 expiration date in H.J. Res. 638 was adopted expressly "to coincide with State legislative sessions in the unratified States in 1982 [to] give those States an opportunity to consider the amendment in 1982." H.R. Rep. No. 95-1405, 95th Cong., 2d Sess. at 1 (1978).

The decision below, declaring debate or voting on the matter in January through June 1982 to be an idle gesture, wholly frustrates Congress' intent. At best, it will confuse the debate in as yet undecided states. At worst, it could eliminate the ERA entirely from the legislative agenda during the pendency of the decision.[1/]

This is by no means an unintended consequence of the court's ruling: The court was urged to hold as it did partly to vindicate a supposed right to end any further occasion for debate or discussion on the proposed amendment[2/] -- something the court

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1/ This Court has recognized in other circumstances that "declaratory relief alone has virtually the same practical impact as a formal injunction would." Samuels v. Mackell, 401 U.S. 66, 72 (1971).

2/ See, e.g., plaintiffs' Complaint at 23 (citing the time and energy devoted by the legislature to debates on the ERA "which should be devoted to the interests of their constituents"); id. at 22 (citing the lobbying efforts of NOW and others directed at Missouri, Nevada and Florida).

quite plainly supposed it had accomplished,[1] something many observers heralded as fact,[2] and something that would indeed have to follow if the decision of the district court were regarded as a correct statement of the applicable law.

The situation presented here in critical respects parallels that of a prior restraint[3] or of obstructions to

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1/ In denying the request for a mandatory injunction as unnecessary, the district court stated that:

> "From the rulings that this Court has made on the questions of the validity of Idaho's rescission and the constitutionality of the extension, it appears that these declarations alone are enough to settle all disputes between the parties. Since the Court has found the rescission of Idaho's prior ratification to be valid and the congressional act of extension unconstitutional, little would be served in granting the plaintiffs' request for an order directing the Administrator of the General Services (sic) to return Idaho's ratification papers, and barring him from accepting further ratifications." Memorandum Opinion at 70, App. to Jr. Stmt. in No. 81-1282, at p. 92a.

2/ See, e.g., "Death Knell for ERA Tolled by U.S. Judge", Chicago Tribune, Dec. 23, 1981, p. 1; "Judge Deals a Deadly Blow to ERA", Los Angeles Herald Examiner, December 24, 1981, p. A-1; "Judge's Ruling May Result in Death of ERA", The Tampa Times, December 23, 1981, p. 1A.

3/ See, e.g., Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 1329, 1334 (1975) (Blackmun, J., granting reapplication for preliminary stay); New York Times v. United States, 403 U.S. 713, 714 (1971).

ballot access[1/] or delegate seating[2/]; in all of these situations the fact of delay itself threatens the very right in question, and this Court generally takes prompt action. Yet even stale news sometimes sells, and elections have on occasion been deferred. But in this case there will soon be nothing at all to deliberate about with respect to the ERA, at least for those eight states whose legislatures recess in late January (Utah), in March (Virginia, Florida, Georgia), or in April (Mississippi, Alabama, Missouri, Arizona). See Declaration of Eleanor C. Smeal, Exh. A. If there is to be any meaningful review of the district court's far-reaching ruling -- and if the policy of Congress is to be given any chance of effectuation -- expedited consideration is thus absolutely essential. Without it, the congressionally mandated opportunity for debate unhindered by doubts about whether the amendment has already died will be lost in more and more states as time inexorably passes without review and reversal by this Court.

Nothing in NOW's position on this point assumes that the district court's decision will in fact decisively end debate and voting on the ERA. Even if the decision below only confuses matters;[3/] even if it merely provides an excuse for some

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1/ See, e.g., Fowler v. Adams, 400 U.S. 1205, 1206 (1970) (Black, J., in chambers); Davis v. Adams, 400 U.S. 1203, 1204 (1970) (Black, J., in chambers).

2/ See O'Brien v. Brown, 409 U.S. 1, 4-5 (1972).

3/ For example, the leadership of the Georgia General Assembly Committee scheduled to consider the ERA at its next session has announced that they will delay any action on the ERA pending a legal opinion being requested from the State Attorney General on whether the district court's decision renders "unconstitutional any action by the Georgia General Assembly" on the ERA. "Rep. Clark May Sidetrack ERA Consideration", The Athens Observer, December 31, 1981, at 2-A. The Committee is in a "quandary", according to its Vice Chairman, "as to the validity" of the ERA. Id.

(including both opponents and sympathizers of the amendment) who would rather not commit themselves; indeed, even if it wins more ratification votes than it loses, the indisputable fact is that it puts a federal judge onto the stage of what should have been a purely political drama, altering the script with a radically new sub-plot and changing the climax in ways that no one can predict but that only this Court can end. As Justice Rehnquist recently observed, "It is . . . imperative that this Court . . . ensure that resolution of a 'political question,' which should not have been decided by a lower court, does not 'spawn any legal consequences.'" Goldwater v. Carter, 444 U.S. 996, 1005-06 (1979) (Rehnquist, J., joined by Burger, C.J., and Stewart and Stevens, J.J., concurring).

II. POWERFUL CONSIDERATIONS PECULIAR TO THE ROLE OF THE FEDERAL JUDICIARY IN THE AMENDMENT PROCESS FURTHER SUPPORT THE MOTION TO EXPEDITE.

The frustration of congressional purpose brought about by the district court's decision has occurred here in the uniquely significant context of the process for amending our most fundamental body of law. The fact that we are here dealing with a proposed constitutional amendment -- and one that has been the focus of intense debate and discussion in almost every state -- leaves no doubt that the case before this Court is one of the utmost public importance and urgency. And it renders judicial meddling of the sort practiced by the district judge here particularly inappropriate.

Because we are dealing with a proposed constitutional amendment, and because the amendment is aimed in part at federal court rulings, the case for non-intervention by the Federal

Judiciary is especially strong.[1/] Indeed, the specific subject at hand -- gender discrimination -- has already led several Justices to construe the Fourteenth Amendment with an eye to minimizing any unintended impact on consideration of the proposed Twenty-Seventh.[2/]

Nonetheless, in the absence of immediate review, the distortion of the amendment process as enacted by Congress will be the irreversible result of action taken single-handedly by one district judge. Surely the same concerns which have motivated members of this Court in prior sex discrimination cases to avoid any impact on consideration of the ERA require treating this case too in a manner calculated to minimize such impact -- particularly since it may ultimately be held that the impact in question was unwarranted. And if there <u>are</u> grounds for judicial intervention during the critical amendment process, surely it should be on the basis of a decision of the Supreme Court of the United States, not of a single district judge.

III. NO LEGITIMATE CONSIDERATIONS ARGUE <u>AGAINST</u> EXPEDITING THIS CASE.

Because no action by any particular individual was specifically ordered or forbidden by the court below, no stay is being sought here. As a result, it is unnecessary to engage in a balancing of equities or harms to determine if equitable relief

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1/ <u>See</u> Goldwater v. Carter, 444 U.S. 996, 1001 n.2 (1979) (Powell, J., concurring).

2/ Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., joined by Burger, C.J. and Blackmun, J., concurring in judgment).

would be appropriate. But even if the immediate review needed to carry out the policy of Sections 1254(1) and 2101(e) is to be governed by an equitable standard, it is clear -- under any test -- that the equities here favor expedited review.

The fact that an Act of Congress has been declared unconstitutional in a case binding the United States is at least a strong reason -- if not a conclusive one -- in any equitable balance.[1/] Moreover, in the absence of expedited action by this Court, the harms which will be suffered -- at the very least, the deflection of the amendment process and the frustration of congressional legislation -- are great and irreversible. As for likelihood of succcess on the merits, we submit that not only did the court below create a case or controversy where none existed, but its resolution of the issues on the merits finds no support in the Constitution or in the precedents of this Court.

And perhaps most important, no competing harms exist which might counsel against expedited review in this Court: Crucially, plaintiffs and plaintiff-intervenors join NOW in urging expedited resolution of this case.

Finally, no rush to judgment is here proposed. The briefing and argument schedule suggested above should leave ample time for thoughtful consideration of the issues this case poses. It is relevant in this respect that the questions presented, although of great importance, are not of commensurate difficulty. This Court's precedents, see, e.g., Coleman v. Miller, 307 U.S. 433 (1939), point unerringly to a clear conclusion.

1/ See Marshall v. Barlow's, Inc., 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers).

IV. THERE IS NO MERIT IN THE SUGGESTION THAT THIS CASE SHOULD NOT BE EXPEDITED "SINCE THE ENTIRE MATTER MAY BE RENDERED MOOT IN THE MONTHS AHEAD."1/

Before the district court entered the political fray of the amendment process and derailed that process through its premature adjudication on December 23, 1981, it might have been argued -- and NOW indeed did argue and argues here -- that there was no ripe controversy to warrant any such action by that court. Now that the district court has acted, it might be suggested that the proper remedy is inaction by this Court -- inasmuch as the whole case could become moot if not enough states ratify between now and June 30.

That argument is utterly spurious. Given the confusion spawned by the court below, the entire course of ratification debate and discussion -- from the moment the district court ruled until the moment its ruling is set aside -- is obviously and hopelessly tainted by what that court did. To say that a wait-and-see attitude might in hindsight make sense if it should turn out that fewer than three more states ratify by June 30, 1982, is simply to ignore the crucial fact that the reason for so few ratifications could well be the very decision that this Court is being asked to let stand. As the court of appeals said in ordering that NOW be allowed to intervene in this very case, "the continued vitality of the ERA . . . would as a practical matter be significantly impaired by an adverse decision," 625 F.2d at 887; App. N. to Jur. Stmt. in No. 81-1282 at p. 176a.

To be sure, any such causal connection must, of necessity, remain speculative. Perhaps the various distortions triggered by the ill-considered action of the district court will

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1/ Department of Justice Press Release, January 5, 1982, p. 1.

just manage to cancel one another out, yielding no net change in actual ratifications. But perhaps not. No one will ever know. To assume, in the face of such irreducible uncertainty, that the decision below will have no negative effect is to bootstrap this case into a "mootness" of the Federal Judiciary's own making.

In these circumstances, the prospect of mootness that is being held out as a possible benefit of delay by this Court must, in truth, be counted as perhaps the most serious potential cost of leaving intact an egregiously mistaken judicial decision. The only defensible approach is to clear the political stage of a judicial actor who had no business making an appearance. That in turn requires reversing the role the district court played here -- not sitting passively by while that role threatens to change forever the play's conclusion.

CONCLUSION

By its decision, the court below transformed a situation lacking even a ripe controversy into one urgently requiring this Court's plenary and prompt review. Only immediate action here can respect the policy of "expedited review when circumstances warrant" and the integrity of the amendment process. Nothing less can assure timely correction of the constitutional excesses committed by the court below.

Respectfully submitted,

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January 8, 1982
[corrected January 9, 1982]

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Expedite [corrected January 9, 1982] has been served on all parties required to be served by mailing copies thereof, by first-class mail, postage prepaid, unless otherwise indicated as follows, this 9th day of January, 1982, to:

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John Vanderstar

DECLARATION OF ELEANOR C. SMEAL

1. I am president of the National Organization for Women, Inc. ("NOW"). I make this declaration in support of NOW's motion for expedited review by the Supreme Court of the ERA decision by Judge Callister of the Idaho District Court.

2. NOW is a non-profit corporation that was organized in 1967 under the laws of the District of Columbia. With over 156,000 members and 726 chapters throughout the nation, NOW is the largest membership organization in the United States dedicated to improving the status and rights of women and bringing women into full participation in the mainstream of American society. For the past 14 years, the first priority of NOW and its affiliate chapters has been ratification of the Equal Rights Amendment to the Constitution of the United States. NOW played a major role in persuading Congress to propose the Equal Rights Amendment to the states for ratification; was a principal force in the ratification efforts in the 35 states that have ratified the ERA to date; and led the drive which culminated in Congress extending to June 30, 1982, the time to ratify the ERA. These activities have involved a massive investment of human and economic resources by NOW and its members.

3. I personally have served as president of NOW since 1977. I have been the Chair of the ERA Strike Force, which directs NOW's ERA ratification efforts, since it was

established in 1977. As the Chair I was responsible for leading NOW's campaign to extend the ERA deadline in Congress, and I am ultimately responsible for the direction of NOW's campaign in each of the various states for ERA.

4. NOW's current efforts to achieve ratification of the ERA involve an active political and legislative campaign conducted by paid staff and full-time and part-time volunteers working in some 14 ERA Countdown Campaign offices. NOW is engaged in nationwide recruitment of personnel and in fund-raising to support these efforts. NOW's ERA campaign is carried out in conjunction with the efforts of over 450 organizations that are also committed to ratifying the ERA.

5. Most state legislative sessions are two years in duration but last only a few months in the first half of each calendar year. During the campaign for ERA extension, I vigorously argued, and ultimately this argument prevailed, that if Congress extended the deadline an "even" three years -- from March 22, 1979 to March 22, 1982 -- the effect would be to eliminate for several of the key unratified states the final year of the second legislative session (1981-82) being granted by Congress. Traditionally, for example, Illinois never begins serious consideration of controversial items until after its primary elections in mid-March. For that reason, the ERA debate in Illinois has usually been in the

month of May. I argued that for there to be full consideration in the legislative session of 1981-82, the extended time for ratification would have to go to June 30, 1982, a date by which most legislative sessions have adjourned, to allow consideration in all of them. Extension until June 30th was important because, throughout the campaign for ratification, proponents have been plagued by the public's lack of knowledge about the legislative process. Without a full legislative term in 1982, proponents would have been forced to bring up the ratification resolutions in 1981. The difficulty of bringing up the resolutions in 1981 is that many would have erroneously believed we had more time than we actually had. Without a full legislative session in 1982 to consider the ERA, we would have had, for all intents and purposes, a deadline of June 30, 1981. This argument was accepted by Congress, and the deadline it established was June 30, 1982.

6. Any piece of legislation defeated in the first year of a legislature's two-year session cannot ordinarily be brought up or considered in the second year's session. The strategy of the ERA supporters for the 1981-82 session was to have all votes and debate in the legislative bodies on ratification in 1982, not 1981. The theory has been that the closer we are to the deadline, the stronger the campaign can be. Right now, we are on the eve of the opening of most of the legislative sessions. The ERA discussion and debate in the

legislative sessions themselves will begin this month in several of the states.

7. It is my opinion that the federal district court's decision, handed down right before these crucial legislative sessions open, has the effect of diverting the discussion so that much of it now focuses on the legal parameters of extension and rescission rather than the merits of the amendment itself. A survey of our field offices indicates that they have had mixed and confused reactions about the decision. The consensus is that the decision has a negative impact on the proponents' campaign, although no one can ascertain the precise effect. Campaign workers as well as the general public have questioned whether efforts to ratify the ERA are now legal, or whether the campaign can even continue. In at least one state, it has been reported that legislators are questioning whether the vote on the ERA is permissible or legal until the decision is reversed. ERA supporters have had to shift energy and resources to addressing the legal questions that have been placed in the center of the campaign, and to persuading legislators and the public that the district court decision is indeed <u>not</u> final and that the campaign can and must go on.

8. I or my representatives have spoken to selected sponsors in key states where I believe votes are most likely to occur, and we have been told that an expedited decision

would greatly relieve this confusion and make more likely a full and fair consideration on the merits of the ERA. Based on these conversations, it is my conviction that prompt Supreme Court action to set aside the district court's decision and establish that the political process of debating and voting on the ERA would be free from judicial intervention, would resolve the uncertainties and allow consideration of the ERA to proceed unhampered by the confusion created by the decision.

9. NOW has contacted the offices of legislative officials and Secretaries of State in the unratified states to determine the time during which the legislatures will be in session. The chart attached as Exhibit A describes as accurately as possible the legislative schedule in these states. For each state, the chart gives the latest possible date anticipated for adjournment. The time schedule illustrates the potential impact of the district court decision each week it remains unreviewed. By the end of March, four states plan to close their legislative season; by the end of April, four more will go out of session.

10. The legality of ERA extension and rescission are not academic issues. It is my strong belief that in several states the vote on ratification of the ERA is extremely close, and that ratification of the Equal Rights Amendment is possible in the remaining months. Past votes rejecting ratification in fact have often been very close, as close as two

votes. For example, in 1977, the ERA was defeated in the North Carolina Senate by only two votes, after having passed in the North Carolina House. In 1979, it lost in the Florida Senate by only two votes, after having passed the Florida House. The votes have been so razor thin that every vote has counted. Therefore, I believe that if even one legislator's opinion in one state is or has been influenced by the district court opinion, the ratification of the Equal Rights Amendment may hang in the balance.

11. The ERA has been a major issue for numerous organizations for a long period of time. The campaign for ratification is more than politics as usual. Literally hundreds of thousands of people in our country have participated in this campaign to support the ERA. Some of the largest public political events in our nation's history have been in connection with the Equal Rights Amendment campaign and the successful effort to persuade Congress to extend the ratification period itself involved literally hundreds of thousands of people. Those who have worked so hard in this effort for women's rights will feel badly cheated if in the 1982 legislative session the debate on the ERA is irreversibly distorted by the decision of a single federal judge. The intensity of this feeling is only aggravated by the knowledge that this particular judge has held a high leadership position in one of the principal opponent groups that we have faced repeatedly

on the campaign trail. In denying motions filed by the Department of Justice and NOW asking that he disqualify himself, Judge Callister offered the consolation that whatever he decided would be subject to full appellate review, and could be corrected if needed on appeal. However, by issuing his decision on the eve of the opening of the final legislative session for consideration of the ERA, Judge Callister has effectively eliminated the time for normal appellate review. It is my strong belief that only prompt and comprehensive review by the Supreme Court will eliminate the sense of injustice that the ratification debate could be so greatly affected by Judge Callister, and that this one man could effectively cast the final vote on the Equal Rights Amendment.

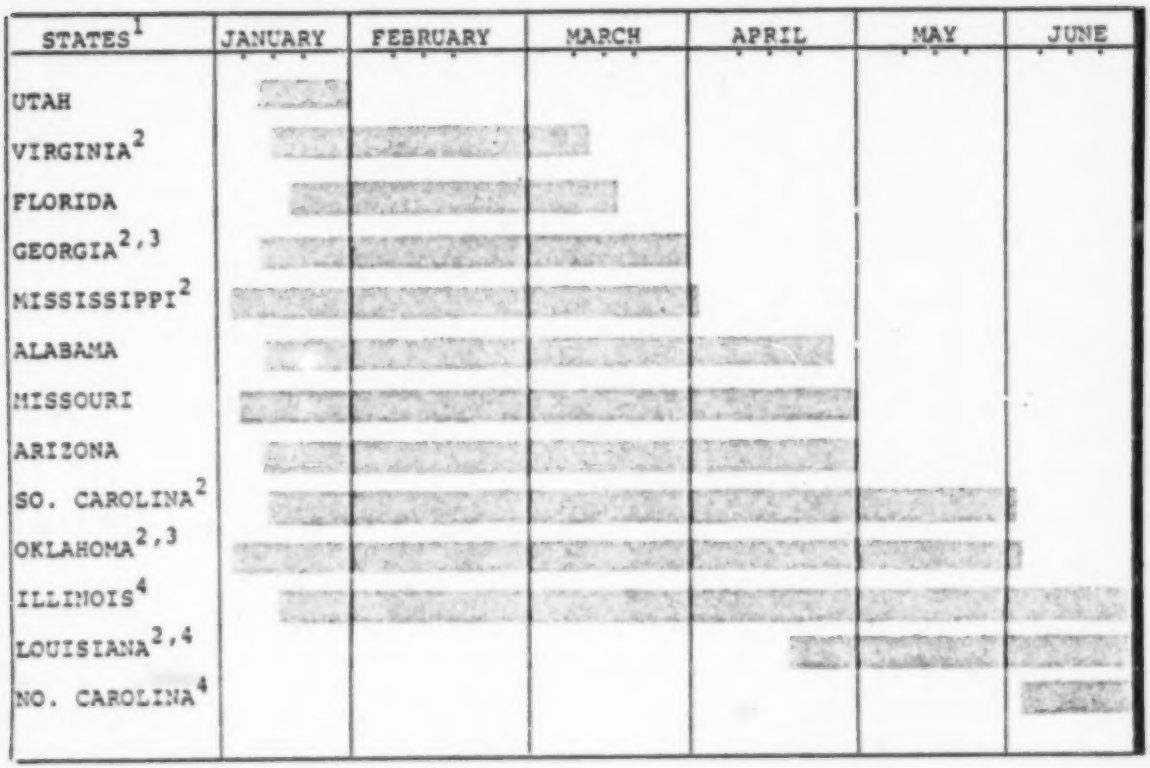
12. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Eleanor Smeal

Eleanor C. Smeal

EXHIBIT A

1982 LEGISLATIVE SCHEDULE IN UNRATIFIED STATES



Notes

1 Nevada and Arkansas, which also have not ratified the ERA, do not have regular legislative sessions scheduled for 1982.

2 These state legislatures follow a "crossover" practice which requires favorable action by one house of the legislature by a date earlier than the date scheduled for the full session to end. For example, in Mississippi the crossover date by which action must be completed in one house is March 2, 1982, more than a month before the session is scheduled to end.

3 Legislature meets for a fixed number of days, which may be consecutive or not. Oklahoma convenes on January 5, 1982 for 90 "legislative days" and usually adjourns during the first week in June. Georgia convenes on January 11, 1982 for 40 "working days" and could adjourn as early as February 19, 1982.

4 Legislative session may extend beyond the June 30, 1982 deadline for ratifying the ERA.

Reply Brief

Office - Supreme Court, U.S.
FILED
JAN 14 1982
ALEXANDER L. STEVAS,
CLERK

IN THE UNITED STATES SUPREME COURT
October Term, 1981

No. 81-1283

NATIONAL ORGANIZATION FOR WOMEN, INC., et al

Petitioners,

-vs-

THE STATE OF IDAHO, et al,

Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RESPONDENTS' MOTION TO EXPEDITE AND RESPONSE TO PETITIONER NATIONAL ORGANIZATION FOR WOMEN, INC.'S SUGGESTED BRIEFING AND ARGUMENT SCHEDULE

Respondents herein, plaintiffs and plaintiff-intervenors below* (hereinafter respondents), move this Court for an expedited review of the district court decision holding: (a) that a state has the power and right to rescind a prior adoption of a proposed constitutional amendment at any time prior to the unrescinded ratification by three-fourths of the states of the United States properly certified by the General Services Administration (hereinafter the GSA); (b) that the adoption by Idaho of the Twenty-Seventh Amendment was properly rescinded and such prior adoption is void, as is the adoption of any other state that has properly rescinded its adoption; and (c) that Congress' attempted extension of the

* Plaintiffs and plaintiff-intervenors file this motion jointly. However, plaintiffs and plaintiff-intervenors intend to file separate motions to affirm and separate briefs on the merits.

time for ratification of the Twenty-Seventh Amendment was null and void. A suggested expedition schedule is included herein.

The decision by the district court below consists of an in-depth and extensive construction of the most fundamental of all articles of the Constitution, Article V, dealing with the amendatory process. An expedited review by this Court is the only manner in which that opinion may be judicially reviewed and validated to assure the continued integrity of the amendatory process under Article V, United States Constitution. The opinion below constitutes a scholarly and well-reasoned opinion which, when affirmed by this Court, will serve as a definitive guideline under Article V for the amendatory process. This is especially important now that the country appears to be approaching a period of frequent potential use of the amendatory process, under Article V, on such sensitive and important issues as right to life, gun control and a balanced federal budget.

By this motion, respondents join with petitioner, National Organization for Women (hereinafter NOW), in requesting this Court to promptly note jurisdiction and to set an expedited briefing and argument schedule.

The proposed Twenty-Seventh Amendment, dealing with equal rights for men and women, was proposed by the Congress of the United States in March of 1972. By its terms, it was to become part of the United States Constitution if ratified by three-quarters of the several states by March 22, 1979. Thereafter, it became apparent to the general public as well as to Congress that the requisite number of states would not ratify the proposed Twenty-Seventh Amendment by the deadline. Subsequently, on October 6, 1978, an extension resolution, House Joint Resolution 638, was presented to Congress for considera-

tion. House Joint Resolution 638 purported to extend the time for ratification for a period of three years and three months to June 30, 1982. On May 9, 1979, the plaintiffs below filed this action in the United States District Court for the District of Idaho seeking declaratory and injunctive relief. After considerable delay resulting from procedural infighting, the respondents' motion for summary judgment and the cross-motions for summary judgment of the petitioner and the defendant GSA, and the petitioner's and defendant GSA's motion to dismiss were heard by U.S. District Judge Marion Callister on May 13 and 14, 1981. On December 23, 1981, Judge Marion Callister ruled in favor of the respondents herein and against the defendant and defendant-intervenors below. However, the judge did not grant respondents' requests for injunctive relief. The purported extension of time for ratification of the proposed Twenty-Seventh Amendment by the several states set forth in Congressional House Joint Resolution 638 would expire by its own terms on June 30, 1982.

The decision below marks the first time in the history of the United States of America that a federal court has declared an act of Congress dealing with the amendatory process unconstitutional. Further, the lower court for the first time in history held that a state may rescind its prior adoption of any amendment proposed under Article V of the Constitution.

The petitioner herein is NOW. NOW and the GSA have filed notices of appeal to this Court pursuant to 28 U.S.C. § 1252. Additionally, both have filed notices of appeal to the Ninth Circuit Court of Appeals. NOW has filed with this Court, pursuant to 28 U.S.C. § 1254(1), a petition for writ of certiorari to this Court from the Ninth Circuit Court of Appeals before rendition of judgment.

Respondents join with NOW in requesting that this Court note probable jurisdiction of this matter as soon as possible. They will, pursuant to Rule 16 of this Court, file a motion to affirm the holding of the district court below. It is requested that the Court enter an order expediting the briefing schedule and argument in this matter. Respondents herein, plaintiffs and plaintiff-intervenors below, intend to file their motion to affirm, pursuant to Rule 16 of the rules of this Court, in response to the jurisdictional statement of appellant NOW on or before January 22, 1982. Thereafter, appellees will file their motion to affirm as to the jurisdictional statement of the appellant, GSA, on or before January 27, 1982. Respondents have been informed and believe that the GSA jurisdictional statement will be filed with the Court during the week of January 11-15 or early in the week of January 18. If the Court should note probable jurisdiction of this matter based upon the jurisdictional statements filed by the appellants on or before January 29, 1982, it is believed that all parties could with due diligence meet the following expedition schedule for briefing and oral argument:

February 8, 1982 -	The GSA and NOW would file their opening briefs
February 19, 1982 -	The respondents would file their answering briefs
February 23, 1982 -	The GSA and NOW would file their respective reply briefs
March 1, 1982 (or as convenient for the Court) -	Oral argument would be heard

While respondents agree that the briefing schedule and oral argument in this matter should be expedited, they do not encourage the simultaneous filing of briefs by the parties. Rather, series briefing as is normally done in cases of this

nature should be adhered to. The foregoing schedule and the filing of briefs in series give each of the parties more time to deal with the fundamental constitutional issues raised below and on appeal. There would be no rush to judgment, but the issues could still be argued and considered expeditiously. It is possible to expedite in this fashion because of the extensive briefing by all parties concerned below and the well thought-out opinion issued by Judge Marion Callister. The issues were finely tuned by the parties during the two years from the time the case was filed until oral argument was held, and during the more than two and one-half years between the date of filing and the date of the decision in this case. Judge Marion Callister wrote a 72-page memorandum decision and supplemented the decision with 8 1/2 pages of detailed footnotes. Therefore, a reasonable schedule of expedition can easily be adhered to by all parties. However, because of the extremely important and fundamental constitutional issues involved, the extremely "fast-track" expedition schedule requested by NOW would be unsatisfactory.

However, the fast-track expedition schedule requested by NOW would pose a hardship for the respondents herein for the reason that two states, the State of Arizona and the State of Idaho, are involved as respondents and three individual legislators from the State of Washington are involved as respondents. Communication and coordination by and among counsel for these parties require time and travel due to the geographical separation of counsel. The same time and distance factors affect respondents' ability to communicate with the Court on a hasty schedule. Additionally, as of this date, the United States Department of Justice has not filed its jurisdictional statement or motion to dismiss on behalf of the GSA, although

counsel for the respondents have been advised that the same will be filed during the week of January 11-15 or early in the week of January 18-22. In order to allow adequate time for all parties to analyze the issues and take the mandatory procedural steps involved in an appeal of this nature, respondents' schedule should be adopted.

SUMMARY

The case below and before this Court presents immense constitutional issues regarding the most fundamental article of the United States Constitution. At the center of the controversy lies Article V, U.S. Constitution, the portion of the Constitution which controls the amendment of that document. Article V has but one statute delimiting the terms of the article, to-wit, 1 U.S.C. § 106(b). Additionally, no rules or regulations have been promulgated by any administrative bodies or agencies further delimiting or defining the rights or powers of the GSA pursuant to 1 U.S.C. § 106(b) or under Article V, U.S. Constitution. The respondents have never viewed the instant case as one dealing primarily with the Equal Rights Amendment. Rather, because of events surrounding the proposal of the Twenty-Seventh Amendment, it has been viewed as a pure constitutional law case aimed at clarifying the amendatory process under Article V of the Constitution. The magnitude of the issues, the extensive, persuasive and careful nature of the opinion, and the current and proposed activity under Article V, demonstrate the necessity of establishing the rules under which the amendment process is carried out. A decision by this Court affirming or reversing the lower court's decision will clearly advise the public and the legislatures of the various states as to the status of the proposed Twenty-Seventh Amendment and

acceptable standards of conduct under Article V, U.S. Constitution.

ARGUMENT

It is apparent that the petitioner herein has a right of direct appeal to this court pursuant to 28 U.S.C. § 1252. The district court's decision below is a valid decision breaking judicial ground in an important, correct and persuasive manner. That opinion should be affirmed by the highest Court of this land because of the fundamental constitutional issues involved.

Without debate as to the practical effect the lower court decision may have on the proposed Twenty-Seventh Amendment, it is respondents' position that a prompt and full review of the lower court decision by this Court is necessary in view of the fundamental constitutional issues involved.

The decision below directly avoids the clear intent and attempted action by a majority of the members of both Houses of the Congress evidenced by their votes in favor of the passage of House Joint Resolution 638 which purportedly extended the deadline for the ratification of the proposed Twenty-Seventh Amendment. It is respondents' contention that the decision of the district judge below was concise, detailed and correct. Nevertheless, the decision did invalidate a resolution passed by Congress and signed by the President and an expeditious review of the lower court decision, whether such review results in an affirmance or a reversal, will be in the best interests of the United States.

Therefore, respondents join NOW in its request for expedition, but request a more reasonable schedule allowing the parties a reasonable chance to adequately brief the immense

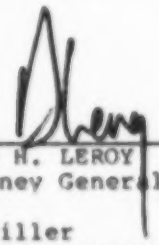
constitutional issues involved and to support or criticize the 72-page decision below.

CONCLUSION

The purpose of the action below was not to frustrate or stop the proposed Twenty-Seventh Amendment itself but was to obtain judicial guidance in outlining the various functions inherent under Article V, U.S. Constitution. An expedited review of the lower court decision will serve to more clearly and authoritatively define the various roles. The desirability of the Equal Rights Amendment is not at issue in this appeal nor was it at issue in the lower court. Simply stated, a decision on appeal of this matter by this Honorable Court can help to maintain the integrity of the amendatory process of the U.S. Constitution for generations to come.

DATED: January 13, 1981.

RESPONDENTS:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of January, 1982, true and correct copies of the foregoing RESPONDENTS' MOTION TO EXPEDITE AND RESPONSE TO PETITIONER NATIONAL ORGANIZATION FOR WOMEN, INC.'S SUGGESTED BRIEFING AND ARGUMENT SCHEDULE together with petitioners' APPEARANCE, were served upon the following:

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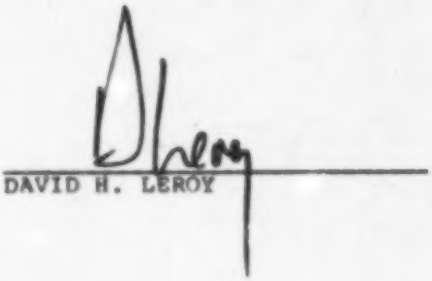

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